Petition

81-694

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No._____

In The

Supreme Court Of The United States

October Term, 1981

_____0_____

UNITED STATES OF AMERICA
Appellee

vs.

LARRY CAIN AND GLORIA ASANTHIA CARR CAIN
Defendants-Appellants

_____0_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

_____0_____

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QUESTIONS PRESENTED

1. Did the district court comply with Rules 11(c) and (f) of the Federal Rules of Criminal Procedure and thus insure that the defendant's pleas of guilty were made intelligently and voluntarily and had a factual basis?

2. Did the district court abuse its discretion by denying the defendants' motion to withdraw their guilty pleas prior to sentencing?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA

Appellee

vs.

LARRY CAIN AND GLORIA ASANTHIA CARR CAIN

Defendants — Appellants

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners, Larry Cain and Gloria Asanthia Carr Cain pray that a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on July 16, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is a published Per Curiam opinion dated on 16 day of July, 1981 and entered on the 16 day of July, 1981. A copy of this opinion is included in the APPENDIX hereof as EXHIBIT "A". This opinion is cited as 653 Fed. 2d 883.

The District Court's opinion denying the defendants motion to withdraw their pleas of guilty appears in the APPENDIX hereof as EXHIBIT "B".

JURISDICTION

Jurisdiction in this cause is premised upon Title 28 USC § 1254(1) for review, by certiorari, of the Judgment and opinion of the United States Court of Appeals for the Fourth Circuit. A written Per Curiam Opinion was dated by that court on 16 day of July, 1981 and entered on the 16 day of July, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of Rule 11(c), (d), and (f) as well as Rule 32 (d) of the FEDERAL RULES OF CRIMINAL PROCEDURE are set forth in the APPENDIX hereof as EXHIBIT "C".

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STATEMENT OF CASE

This is a criminal proceeding charging the defendants in a Ten Count Indictment, filed on October 29, 1979 entitled, United States of America against the defendants Larry Cain and Gloria Asanthia Carr Cain for the violation of Title 18 USC section 2 and 1584. The defendants were indicted by a Federal Grand Jury for the alleged violations, which were to have occurred within the jurisdiction of the United States District Court for the Middle District of North Carolina (Durham Division). At the time of the indictment, the defendants Larry Cain and Gloria Asanthia Carr Cain were residing in the State of South Carolina in or near the City of Florence.The co-defendant, Robert Allen Carr was residing in the State of California in or near the City of Los Angeles.

Pursuant to a Rule 20 Transfer, this case was transferred from the United States District Court for the Middle District of North Carolina (Durham Division) to the United States District Court for the District of South Carolina. The defendants executed Waivers and consented to be tried in South Carolina.

The defendant Robert Allen Carr executed a Waiver and pursuant a Rule 20 Transfer agreed to be tried in the United States District Court, Central District of California. On Wednesday, February 20, 1980 at 4:25 p.m. o'clock the case was called for trial by the District Attorney, Defendants Larry Cain and Gloria Asanthia Carr Cain were present and had employed with them counsel of their own choosing. During the course of the proceeding the District Attorney announced to the court that the defendants had entered into a PLEA, which Plea

Agreement had been reduced to writing. The Plea Agreement was contingent upon Robert Allen Carr, a co-defendant, entering into a similar Plea Agreement in California. After taking the defendants Plea the court adjourned without making a factual finding as specified in Rule 11 of the Rules of Criminal Procedure; whereupon court reconvened on Monday, April 21, 1980 at 4:30 p.m. Prior to sentencing and prior to the court making a factual finding, the defendants moved to withdraw their Pleas of Guilty.

The court below, Hemphill, J., after hearing the Motion, comments of Defense Counsel, Government's Witness, comments from the Honorable District Attorneys and counsel for the defendants, denied the motion to withdraw and pronounced sentence and Judgment upon the defendants. From the refusal of the court to grant their motion, the defendants appeal.

The conspiracy section was read to the defendants. Title 18, Section 1584 was read to the defendants. The Rule 20 transfer was explained to the defendants and the statute was read to the defendants. Both defendants signed the Rule 20 transfer document. It was voluntarily given; they understood what they were signing. They did not wish to withdraw that consent. The defendants' attorney read the Agreement and told the court in his opinion it was free and voluntary. The defendant Gloria Cain agreed to plead guility to counts two and ten. The defendant Larry Cain agreed to plead guilty to count ten. The maximum penalty was explained. The maximum accumlated penalty was explained. Count two and ten of the Indictment were read to the defendant Gloria Cain. The 34 OVERT ACTS were read to the defendants. The defendant Gloria Cain understood count two. She understood count ten. She understood her

maximum exposure to the $15,000.00 or 10 years, or both. The defendant Larry Cain understood count ten of the Indictment and that his maximum exposure if he pleaded guilty would be $5,000 or five years or both. Whereupon the following colloquy took place:

BY THE COURT:

Q. How is it your intention to plead to count two in the Indictment, and count ten in the Indictment, Mrs. Cain: Guilty or not guilty?

A. I wish to plead guilty, but not to say I am guilty.

Q. But what?

A. I wish to plead guilty, but I am not saying that I am guilty.

Q. How is it your intention to plead to count ten of this Indictment? (Addressing Mr. Cain)

A. I wish to plead guilty also, but I am not saying that I am guilty.

Q. Well, how do you expect me to accept your plea, if you're not guilty, Mrs. Cain? If you say you're not guilty, how do you expect me to just say that's the truth?

A. I wish to enter the plea of guilty.

The court was informed by the defendants' attorney that even though the government's case is strong the defendants do not feel they are morally guilty; that it is their desire to enter a plea of guilty for the facts that would support the court's factual finding of guilt but it is their desire that those facts come from the Government in the Government's presentation rather than from their own lips. The government would accept no reservations. Nobody had threatened the defendants or promised them anything. They understood the maximum fine of $5,000.00 or five years, or both. Rule 11(e) was read to the defendants. There was no plea bargain. Other than

the Plea Agreement there was no other Agreement. If the plea were allowed the defendants would give up the right to a TRIAL BY JURY. The right to a Trial by Jury was explained to the defendants. The defendants would be entitled to an attorney appointed by the court. Being without sufficient funds would be no deterrant from having an attorney at all times. You give up the right if you plead guilty. In a guilty plea the witnesses are called only for the 11(f) part of the arraignment. If the defendants are tried before a jury they would not have to stand trial and could remain silent. You have a right to have witnesses to be subpoenaed. By pleading guilty you give up that right. By pleading guilty the defendants would give up the right to poll the jury. If tried and convicted you can appeal. If you plead guilty you lose the right to appeal. Count two of the Indictment would have to be proved; count ten of the Indictment would have to be proved. Both defendants understand that. Both defendants signed the forms tendered to them by the clerk. The defendant Gloria Cain entered a Plea of Guilty to counts two and ten of the Indictment. The defendant Larry Cain entered a plea to count ten of the Indictment. It is the defendants' plea, free and voluntary; whereupon the following colloquy took place:

"THE COURT: All right, Mr. District Attorney, Let's go to Rule 11(f). I hate to stay so late, but —

MR. LYDON: We can take the factual — take 45 minutes to an hour, your honor. We could take it at the time of sentence. Whatever the court desires.

THE COURT: I can take it at the time of sentence. It won't inconvenience these gentlemen?

MR. LYDON: They intend to be back here at the time of sentence anyway, your honor.

MR. WILLIAMS: Your honor, I have no objection to the court reserving its factual findings until that time.

THE COURT: Yes, I have to do that. I will reserve that Rule 11(F).

Now, in the event there is any indication of any intention to change, or any argument thereabout, how about notifying me so that I can arrange the schedule of the Court? You know what I mean?" The proceedings were concluded at 5:45 p.m. On April 2, 1980 the defendant Robert Allen Carr filed a motion to withdraw his plea of guilty entered on February 11, 1980. On April 17, 1980 the defendants Larry Cain and Gloria Cain gave notice of their intentions to withdraw their pleas of guilty.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

The plain meaning of RULE 32(d) of the Federal Rules of Criminal Procedure allows a defendant, before sentence is imposed and on a motion duly made, to withdraw, a PLEA OF GUILTY.

This Court should allow this Writ for the reason that the constitutional rights of the defendants have been placed in jeopardy through their pleas of guilty and the refusal of the Court below to allow them to withdraw their pleas of guilty; and for the further reason that the totality of circumstances, which when taken together, are tantamount to a manifest abuse of discretion. RULE 11 places a duty and responsibility upon the court to make an independant determination, notwithstanding the fact that the defendants have retained counsel. The defendants have every reason to rely on the *plain meaning* of Rule 32(d).

A review of the circumstances under which the Plea

of Guilty is sought to be withdrawn should be of paramount concern to this Court if for no other reason than to review the basis of the rationale of the Court below. By granting certiorari, and taking the facts in the case at bar as presented by the Petitioners, Petitioners verily believe that the reinforcement of the judicial review system will have been complete.

In the case at bar, the Court below failed and neglected to define and explain to the defendants the definition of a conspiracy. The defendants contended from the very outset that they were not guilty even though they were pleading guilty; that her father and his father-in-law was sick and in the State of California and unable to travel to North Carolina; that they were trying to save him the pains of a trial because of his age and infirmity; that they had valid reasons to believe that some of the government's witnesses had recanted their testimony. The Trial Court knew of the defendants' dilemma as the record will reflect; yet the Court below continued to ignore the defendants' request to testify in support of their motion. The defendants for all practical purposes were tried at night. On February 20, 1980 the initial hearing began at 4:25 p.m. o'clock and ended at 5:45 p.m. o'clock. At the conclusion of this hearing the Court made the following comments:

"THE COURT: All right, Mr. District Attorney, Let's go to Rule 11 (f). I hate to stay so late, but —

Mr. Lydon: We can take the factual — Take 45 minutes to an hour, your honor. We could take it at the time of sentence. Whatever the Court desires.

THE COURT: I can take it at the time of sentence. It won't inconvenience these gentlemen?

Mr. Lydon: They intend to be back here at time of sentence anyway, your honor.

Mr. Williams: Your Honor, I have no objection to

the Court reserving its factual finding until that time.

THE COURT: Yes, I have to do that. I will reserve that Rule 11(f).

Now, in the event there is any indication of any intention to change, or any argument thereabout, how about notifying me so that I can arrange the schedule of the Court? You know what I mean?"

Prior to the second hearing and on April 17, 1980, the defendants had filed their respective motions to withdraw their pleas. Then on April 21, 1980, the second hearing began at 4:30 p.m. o'clock and ended at 7:15 p.m. o'clock. The defendants contend that the court itself was not satisfied with the responses the defendants gave and whether the defendants themselves had freely, voluntary and intelligently entered a plea of guilty.

The defendant, Larry Cain was charged with, a conspiracy and with having violated Title 18 U.S.C. § 371. Our courts have held that for the purpose of entry of a guilty plea, a charge of 'conspiracy' is not a self-explanatory legal term or so simple in meaning that it can be expected or assumed that lay persons understand it; that the defendants' age, education, intelligence, alacrity or his response or the fact that he is represented by counsel cannot be a substitute for the explicit requirement of the rule that the Judge must personally and in open court, on the record, determine that the defendant knows and understands the nature of the charge before accepting the guilty plea. See: *United States vs. Wetterlin, C.A.* Ind. 1978, 583 F 2d 346, cert. denied, 99 S Ct. 1044.

Unquestionably where a plea of guilty has been entered, RULE 11 mandates that the Court must first

determine that the Plea is voluntary. *United States vs. Taylor,* C.A. Tex. 1978, 53 F 2d 178, cert. denied, 99 S Ct. 1050.

The court must personally question the defendant that he understands the nature of the charge. *Sellers vs. United States,* C.A. N.Y. 1977, 544 F 2d 554. See also *United States vs. Bardin,* C.A. Mo. 1976, 535 F 2d 1039 for the proposition that where the assertion is made that the court did not comply with the rule, it is the duty of the court of appeals in criminal cases, involving guilty pleas, to review compliance with this rule. The assertion of noncompliance calls for a totality of circumstances review. *Burrough vs. United States,* 1975, 515 F 2d 824.

The defendants submit that the basis for the courts discretion was groundless. In dealing with a motion to withdraw a guilty plea before sentencing, the district court's discretion must be exercised on the basis of sound information, soundly viewed. *Gearhardt vs. United States* 1959, 272 F 2d 499, 106 U.S. App. D.C. 270.

CONCLUSION

With deference to the courts below and, for the foregoing reasons, a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit.

Respectively Submitted,

BY:

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October 1, 1981

APPENDIX

EXHIBIT "A"

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 80-5072

UNITED STATES OF AMERICA, Appellee,

—versus—

LARRY CAIN;
GLORIA ASANTHIA CARR CAIN Appellants,

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert W. Hemphill, District Judge.

Argued: April 7, 1981. Decided: July 16, 1981

Before RUSSELL, HALL and SPROUSE, Circuit Judges.

Earl Whitted, Jr. (Whitted, Jordan & Matthewson on brief) for Appellants; Louis A. Lerner, Department of Justice (Walter W. Barnett, Department of Justice; James P. Turner, Acting Assistant Attorney General; Thomas E. Lydon, Jr., United States Attorney on brief) for Appellee.

PER CURIAM:

The defendants, after pleading guilty, sought, almost two months after entry of their pleas, and five days before the imposition of sentence, to withdraw their pleas. They asserted two grounds for their motions to withdraw their pleas: (1) The failure of the district court to explain adequately, before accepting their pleas, the conspiracy count in the indictment; and (2) The acceptance of their guilty pleas despite the defendants' denial of guilt. Neither ground has merit. A review of the record demonstrates that the district court carefully and fully explained the conspiracy charge in the indictment, and complied with all other provisions of Rule 11, before accepting their pleas. Nor did the defendants deny factual guilt. Their claim that they had denied their guilt rests on a somewhat bizarre theory. They conceded the violation as charged but advanced the unusual argument that since this was merely a violation of a "secular" law and not of their own moral law, they were not guilty. This is not a plea entitled to recognition in a secular law. We, accordingly, conclude that the district court did not abuse its discretion in denying the defendants the right to withdraw their guilty pleas. The judgment of the district court is, therefore,

AFFIRMED.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
SOUTH CAROLINA
FLORENCE DIVISION

UNITED STATES OF AMERICA	) CRIMINAL NO.
	) 80-49
vs.	) ORDER ON
	) MOTION TO
GLORIA ASANTHIA CAIN and	) WITHDRAW
LARRY CAIN,	) PLEA(S) OF
	) GUILTY
	) PREVIOUSLY
DEFENDANTS.	) ENTERED.

This is Criminal Case No. 80-49-5, an Indictment lodged in the United States District Court for the Middle District of North Carolina, Durham Division, on October 29, 1979, entitled at that time United States of America versus Robert Allen Carr, Gloria Asanthia Carr Cain, a/k/a Asanthia Gloria Carr Cain, Larry Cain, and Jimmy Conyers, charge Defendants with violation of U.S. Statutes.

The Indictment as lodged in the Middle District of North Carolina, in the Durham Division contained ten (10) counts. Subsequent to the lodging of that Indictment, the record reflects that on February 5, 1980, there was filed in this court, Rule 20 (Federal Rules Criminal Procedure), a consent to the transfer of the case for plea and sentence, about which each Defendant has been examined by this court in the Rule 11 proceedings which took place on February 20, 1980 in Florence, South Carolina.

As to the Defendant, Gloria Asanthia Carr Cain, I read: "I, Gloria Asanthia Cain, Defendant, have been informed that an Indictment is pending against me in the above designated cause. I wish to plead guilty to the offense charged, to consent to disposition of the case in the District of South Carolina, in which I am held and to waive trial in above captioned district." That is signed January 22, 1980, at Florence, South Carolina. Signed by Gloria Cain and witnessed by counsel for the Defendant.

A similar and identically worded consent has been signed by the Defendant, Larry Cain, and witnessed by his attorney.

Subsequently, by agreement entered into the 22nd day of January, 1980, each of the accused signed and entered into the following Plea Agreement in the Florence Division of this court. And I read that Plea Agreement into this Order.

> 'Agreement made this 22nd day of January, 1980, between and among the United States of America, as, represented by the United States Attorney's office, Middle District of North Carolina, and the Defendants, Gloria Asanthia Carr Cain, a/k/a Asanthia Gloria Carr Cain, and Larry Cain, represented by William Reynolds Williams, Attorney at Law.
>
> "The Defendants are charged in a ten (10) count Indictment which was filed October 29, 1979, in the Middle District of North Carolina, Durham Division, with violations of Title 18, United States code, Sections 2, 371, and 1584.
>
> "In consideration of the mutual promises made

herein, the parties hereto agree as follows:

"1. The Defendant, Gloria Asanthia Carr Cain, a/k/a Asanthia Gloria Carr Cain, agrees to plead guilty to counts two (2) and ten (10) of the Indictment, and Larry Cain agrees to plead guilty to count ten (10) of the Indictment.

"2. The Government agrees to dismiss the remaining counts of the Indictment pursuant to Federal Rules of Criminal Procedure 11(E) (1) (A).

"3. The Government expressly reserves its right of allocution at the time of sentencing for the purpose of making statements and presenting evidence regarding aggravating circumstances and for the purpose of making a recommendation regarding sentence.

"4. All of the above is contingent upon Robert Allen Carr's entering into a similar Plea Agreement involving counts nine (9) and ten (10) in the Central District of California."

Such is executed, and the court inquired about this in the Rule 11 proceedings. The Plea Bargain was also executed by William Reynolds Williams, Attorney for Defendants, Gloria Cain and Larry Cain, and Thomas E. Lydon, Jr., and the United States Attorney for the District of South Carolina.

Subsequently, on February 20, 1980, there was entered and filed a Plea of Guilty as to count (10), signed by Larry Cain, and about which he was examined in the Rule 11 proceedings.

On the same date, to wit, February 20, 1980, Gloria Asanthia Carr Cain signed a Plea of Guilty as to counts two (2) and ten (10) of the Indictment.

As a result of those procedures, this court pursued the Rule 11 proceeding on the 20th day of February, 1980 in Florence, at which time the court as best it could in the discharge of its duties, exhaustively questioned each of the accused as to: The voluntariness of the Agreement as to the charge; as to whether or not they were guilty; as to whether or not they understood it; as to the facts involved - the court going over the facts in the Indictment - and the court pursued every detail the court could think of at that time, not anticipating a motion on change of plea, because counsel had informed the court that no such thing was anticipated.

The Plea of Guilty was accepted, subject to the Rule 11(b) presentation of which was not taken because it was 5:45 p.m. and it was anticipated that ensuing events would take sometime into the night time. All counsel stated it was without prejudice to postpone the sentencing until this date.

Subsequently, the court has been officially notified that in keeping with the Plea Agreement which was entered into in this court on the 22nd day of January, 1980, along with the consent of the then and present counsel for Defendants, that a Co-Defendant, Robert Allen Carr, had entered the agreed plea in California.

Subsequent to that time, on April 17, 1980, counsel for Defendants, William Reynolds Williams, filed a Motion to Withdraw the Plea of Guilty previously entered, basing his authority on Rule 32(d) of the Federal Rules of Criminal Procedure. This court incor-

porates the Rule 11 proceeding as addendum to and appendix to this Order.

It is undisputed that a Defendant has no absolute right of withdraw a Plea of Guilty, even before sentence has been imposed. *United States vs. Ford*, 363 F. 2d 375 (4th Cir., 1966); *United States vs. Truglio*, 493 F. 2d 574 (4th Cir., 1974)[1]; *United States vs. Vasques-Velasco*, 471 F. 2d 294 (9th Cir.), Cert. Denied, 411 U.S. 970 (1973); *United States vs. Simmons*, 497 F. 2d 177 (5th Cir.), Cert. Denied, 419 U.S. 1048 (1974); *United States vs. Barker*, 514 F. 2d 208 (D.C. Cir.), Cert. Denied 421 U.S. 1013 (1975). It's undisputed that the Motion is committed to the sound discretion of the court, and ordinarily would not be disturbed by the Appellate Court unless it constitutes abuse. See *Ford, supra.*

The burden in the Motion is on the Defendant to establish that withdrawal of the Guilty Plea would be fair and just. *United States vs. Ford*, supra; *Verdon vs. United States*, 296 F. 2d 549 (8th Cir., 1961), Cert. Denied, 370 U.S. 945 (1962); *United States vs. Slayton*, 408 F. 2d 559 (3d. Cir., 1969).

This court in endeavoring to process this motion has been guided by the case of the *United States vs. Strauss*, found at 563 F. 2d 127 and 130. In keeping with the guidance of that opinion, this court has asked whether or

[1]Quoting Justice Butzner in United States vs. (SIC) 462 F. 2d 352, 354 (4th Cir., 1972) The Court stated, "xxx we have said that leave to withdraw before sentencing normally would be allowed xxx But this dispensation should not be freely granted when the government has been prejudiced by reliance on the defendant's reason for seeking to withdraw his plea against the prejudice the government will suffer".

not the Plea was unfairly obtained, and the only answer that was given was that since the Plea was obtained, that there has been contact with some of the witnesses before the grand jury for the purpose of getting them to recant. But not all of the witnesses have been contacted, and there is no showing that there was not a sufficiency before the grand jury and no showing that the Plea of Guilty was unfairly obtained in any way. The *Strauss* case also makes a reference to the fact that if the Plea is given through ignorance, fear or inadvertence, it may be void.

In the Rule 11 proceeding before the court on February 20, 1980, this court asked time and time again if Defendants understood the charge. This court read to each of the Defendants the counts in the Indictment, including the overt acts in the conspiracy count of the Indictment, and exhaustively questioned about them. There is no showing by either Defendant that any Plea given in this case on February 20, 1980 was given through ignorance, fear or inadvertence. On the other hand, the government has shown that there would be substantial prejudice because of its reliance on the Defendant's pleas. As it's stated in the Plea Agreement, it is shown that Robert Allen Carr has pleaded guilty in California, in keeping with the Plea Agreement. And it has been stated in this court, and not controverted, that as a result, eight (8) counts of the Indictment have been nol prossed or dismissed, and the government has carried out a part of its Plea Agreement.[2]

The court finds in this case no quarrel by any of the Defendants about the Rule 11 arraignment, and I refer specifically to the opinion of Mr. Justice Butzner in the

[2]The Plea Agreement had been put in effect by Robert Allen Carr, a Co-defendant and father of one Defendant. The government would be prejudiced if the Plea were withdrawn.

Strauss case, because the *Strauss* case says that the district Judge must conduct a Rule 11 examination in an exhaustive way and make sure that Defendants understand the terms of the Plea Bargain, which these counsel have not controverted. There is no exception taken insofar as the Plea of February 20, 1980, is concerned to the quality of the representation received by each of the accused in this case. Nor would this court have any reason to believe that the quality of that representation is any less or was any less than excellent at the time.

There is no quarrel that the mental condition of either Defendants was of such nature as to make the Plea either not understandable or incompetent in any way.

At one time in the Rule 11 proceeding the defendants, each of them, made some remarks about pleading guilty, but they weren't sure whether they were guilty. At this time the court in the Rule 11 proceeding in detail explained to the Defendants that the court could not accept the Plea, unless the defendants were in fact guilty, and the counsel at that time explained to the court that the Pleas were not given under the Rule in the North Carolina case in which a Defendant was allowed to plead guilty to something, although he asserted his innocence.

In looking at other cases having to do with this sort of proceeding, even if Defendants were able to produce witnesses to indicate that new evidence had come into their possession, indicating that the government witnesses had made retractions of prior testimony, (they would be under some duty to inform any recanter that he might be liable to prosecution for perjury if he had testified under oath another way, even if those allegations are true, which has not been supported by credible evidence on this record, the discovery of new evidence or even of

substantial weakness in the government's case does not justify withdrawal of the Plea. The court rules in *United States vs. Pearson*, 483 F 2d 809 (9th Cir., 1973). The acceptance of the Plea and the adjudication of guilt is as binding upon the Defendant as a conviction by a jury would have been.

The record reflects that Defendants' pleas of guilty were indeed accepted. This is further demonstrated by the fact that after Defendants were thoroughly examined as to their understanding of the consequences of their Pleas, the case was set down for sentencing. See *United States vs. Savage, supra*, 561 F. 2d at 556 (court's comments did not indicate rejection of Plea Agreement where court later sentenced Defendant in same proceeding.) The reason that the factual proffer here was postponed was because of the lateness of the hour and the probabilty that the proffer would have been lengthly.

Defendants contend that new evidence had come into their possession indicating that government witnesses have made retractions of prior testimony. The government stated it had made efforts to investigate this allegation and has been unable to come up with any information corroborating this contention. The government did state that Defendants and others associated with the Church of God and True Holiness have made *attempts* to obtain recantations have been unsuccessful. It is extremely doubtful, therefore that the defendants could produce any credible evidence in support of their contention. Where the factual predicate underlying a motion to withdraw a plea is untrue, the motion should, of course, be denied.

Even if the allegation is true, however, the discovery of new evidence, or even a substantial weakness in the

government's case, does not justify withdrawal of a plea. *Pearson, supra.* The acceptance of the plea and the adjudication of guilt is as binding upon the defendants as a conviction by jury trial would have been. *United States vs. Henry,* 459 F. Supp. 199 (S.D.N.Y., 1978). As the Supreme Court stated in *Kercheval vs. United States,* 274 U.S. 220, 223 (1927), "(a) plea of guilty....is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." See also *Brady vs. United States,* 327 U.S. 742 (1970). The Defendant was motivated to plead guilty in part because going to trial would have subjected him to a possible death penalty. Later, the death penalty provision was held unconstitutional, and the Defendant sought to withdraw his plea. The Supreme Court held that the motion to withdraw the plea did not have to be granted. The court's comments on the plea process are germane to this case. The court first noted that decisions to plead guilty are often 'Heavily influenced by the Defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted.' *Id.* at 756. The law does not require, afterwards, that the plea be vulnerable to attack if the Defendant did not correctly assess every relevant factor entering into his decision. *A Defendant is not entitled to withdraw a plea merely because he discovers... that his calculus misapprehended the quality of the state's case...* (Emphasis added.)

Defendants will now probably assert they are not, in fact, guilty of the offenses to which they pled guilty. The courts have rejected the mere allegations of innocence, however, as a compelling enough reason to allow the retraction of a freely given plea of guilty. See *United States vs. Harvey,* 463 F. 2d 1022 (4th Cir., 1972), *cert.*

denied, 411 U.S. 1972 (1973; *United States vs. Del Valle-Rojas*, 463 2d 228 (9th Cir., 1972; *United States vs. Saft*, 558 F. 2d 1073, 1082 n. 11 (2d Cir., 1977); *United States vs. Washington*, 341 F. 2d 277 (3d Cir.), *cert. denied*, 382 U.S. 850 (1965; United States vs. Barker, supra; *United States vs. Giuliano*, 348 F. 2d 217 (2d Cir. 1965). As the court held in *United States vs. Henry*, supra, a conclusory allegation of innocence is an insufficient reason for withdrawal, here the record establishes that the plea was voluntary, unambiguous, and devoid of uncertainty. In *United States vs. Barker*, supra, the court aptly observed that, if an allegation of innocence sufficed to void a guilty plea before sentencing, "the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the Defendant's whim." 514 F. 2d at 221. Questioning of the Defendants and their responses clearly establishes that the Defendants' pleas were voluntary, unambiguous, and devoid of uncertainty.

Defendants' attempt to withdraw their guilty pleas should be viewed in the context of the significant benefits the Defendants have already secured to themselves, discusses *infra*. Courts have viewed with disfavor efforts by a Defendant to use guilty plea process to "play games" with the system. See e.g., *United States vs. Kay* 537 F. 2d 1077 (9th Cir. 1976); *United States vs. Simmons*, supra; *United States vs. Needles*, 472 F. 2d 652 (2d Cir., 1973). Then Circuit Judge Burger's observation in *Everette vs. United States*, 336 F. 2d 9791 984 (D.C. Cir., 1964) is pertinent:

> (W)e are not disposed to encourage accused persons to 'play games' with the courts at the expense of already overburdened calendars.

The substantial prejudice that will be suffered by the government if the pleas are withdrawn must be considered. *United States vs. Brown*, supra; *United States vs. Truglio*, supra; *United States vs. Harvey*, supra; *United States vs. Del Valle-Rojas* 463 F. 2d 228, 229 (9th Cir., 192); *United States vs. Simmons*, supra; *United States vs. Lombardozzi*, 436 F. 2d 878 (2d Cir., 1971; *cert. denied*, 402 U.S. 908; *United States vs. Fallejo*, 476 F. 2d 667 (3d Cir., 1973). Here, all three of the principal Defendants signed agreements in which the government's promises were contingent upon all three Defendants' pleading guilty. In reliance upon the accepted guilty pleas of both Cains and Carr, the government dropped eight (8) substantive counts of the Indictment against Carr at his sentencing in April 7 in keeping with the agreement. If the Cains are permitted to withdraw their pleas, the government will have irretrievably lost its ability to bring Carr to trial with the Cains on all ten (10) counts of the Indictment. In addition, in reliance upon the accepted pleas of the three principal defendants, normal investigative procedures and trial preparation were curtailed. Finally, the government would be prejudiced, were it forced to go to trial, by the complete disclosure of its case through the information it provided to the United States Probation Office and to this Court, copies of which were provided to the defense counsel. No pre-trial discovery motion could have so thoroughly exposed the essence of the government's case, and were the United States compelled to trial now, the Defendant will have secured a substantial advantage. Cf. *United States vs. Stayton*, 285 F. 2d 428 (E.D. Pa., 1968) *vacated on other grounds*, 408 F. 2d 559 (34rd Cir., 1969). See also *United States vs. Brown*, Case No. 79-5037. (Slip Opinion, 4th Cir. published March 11, 1980).

Having found that there is prejudice to the government, and having found that the Defendants have not met the test in the Strauss case, and having in mind the opinion of the per curiam court in *United States vs. Wesley B. Brown, Jr.*, United States Fourth Circuit Court of Appeals Slip Opinion No. 79-5037, decided March 11, 1980, I find that neither Defendant has shown to this court any compelling reason such as the pleas were involuntarily given, or based on inadequate representation by counsel. As this case says, "Aside from the unarticulated but implicit suggestion that he had simply reassessed his overall strategic and tactical situation, Brown could only give as a reason for allowing withdrawal of the plea the suggestion that he had legal defenses to the charges that he desired to have considered in a plenary trial."

The Motion is refused. The Defendants will present themselves to the bar, and government will present its facts under Rule 11 (A). A copy of this Order shall be served on the Defendants in this action.

AND IT IS SO ORDERED.

/s/ Robert W. Hemphill
ROBERT W. HEMPHILL
United States District Judge

April 21, 1980
Florence, South Carolina
Nunc Pro Tunc

APPENDIX

EXHIBIT "C"

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 11 [*c*] *Advice To Defendant:* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) If the defenant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him: and

(3) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) That if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by

pleading guilty or nolo contendere he waives the right to a trial; and

(5) That if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

RULE 11 [d] Insuring That The Plea Is Voluntary: The Court shall not accept a plea of guilty or nolo contendere without first by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

RULE 11 [f] Determining Accuracy of Plea: Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

RULE 32 [d] FEDERAL RULES OF CRIMINAL PROCEDURE (d) Withdrawal of Plea of Guilty: A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Respectively Submitted,

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Opposition

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No. 81-694

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY CAIN AND GLORIA ASANTHIA CARR CAIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly found that the district court had complied fully with Fed. R. Crim. P. 11 and thus insured that petitioners' guilty pleas were made intelligently and voluntarily and had a factual basis.

2. Whether the court of appeals correctly found that the district court did not abuse its discretion in denying petitioners' motion to withdraw their guilty pleas prior to sentencing.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 653 F. 2d 883. The opinion of the district court (Pet. App. 3a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1981. The petition for a writ of certiorari was filed on October 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Larry and Gloria Cain and two co-defendants, officials of the Church of God and True Holiness Principles, were charged in a ten-count indictment with holding nine named persons in a condition of involuntary servitude

between November 1974 and March 1978, in violation of 18 U.S.C. 1584, and with aiding and abetting each other and conspiring with each other to hold these persons in involuntary servitude, in violation of 18 U.S.C. 2 and 371, respectively.[1] On February 20, 1980, both petitioners appeared with counsel[2] and pleaded guilty to count ten of the indictment, the conspiracy charge, which set forth 34 overt acts by one or more of the four co-conspirators, including ordering individuals to perform physical labor; beating or whipping those who refused to work or who tried to escape, or instructing others to whip them; preventing, by physical confinement and other means, persons from escaping or being located; and performing marriages against the participants' wills. In addition, Gloria Cain pleaded guilty to holding a teen-aged girl in involuntary servitude from November 1976 to January 1978 (count two). The factual inquiry required by Fed. R. Crim. P. 11(f) was adjourned, with petitioners' consent, until the day of sentencing.

On April 16, 1980, five days before sentencing, petitioners gave notice of a motion to withdraw their guilty pleas. The motion was argued by counsel at the sentencing hearing on April 21, 1980, and was thereupon denied. The court then conducted the Rule 11(f) inquiry and found there was a factual basis for petitioners' pleas. Larry Cain was sentenced to five years of confinement, and Gloria Cain was sentenced to two consecutive terms of five years and fined $5,000.

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[1]The indictment was returned in the Middle District of North Carolina. Petitioners were apprehended in South Carolina and the case was transferred to the District of South Carolina pursuant to Fed. R. Crim. P. 20.

[2]Petitioners were represented by counsel at every stage in the proceedings and the district court noted that the quality of representation was "excellent" (Pet. App. 9a).

Petitioners appealed, challenging the district court's denial of their motion to withdraw their guilty pleas. The court of appeals affirmed by per curiam order (Pet. App. 1a-2a), finding that the district court had complied fully with the provisions of Fed. R. Crim. P. 11, and holding that the court did not abuse its discretion in denying petitioners' motion to withdraw their guilty pleas.

ARGUMENT

The decision below turns on the particular facts of this case, does not conflict with any decision of this Court or of any other court of appeals, and raises no question warranting this Court's review. The court below fully considered and correctly decided the issues now before this Court. Accordingly, the petition should be denied.

1. Pursuant to Fed. R. Crim. P. 11,[3] the district court, before accepting a guilty plea, must personally address the defendant, advise him of the nature of the charges against him and of certain consequences of pleading guilty (Rule 11(c)), and determine that the plea is voluntary (Rule 11(d)). In addition, before entering judgment on a guilty plea, the court must make sufficient inquiry to determine that there is a factual basis for the plea (Rule 11(f)).

The record in this case fully supports the court of appeals' finding (Pet. App. 2a) that the district court complied with all of the requirements of Rule 11, thus insuring that petitioners' guilty pleas were made intelligently and voluntarily and had a factual basis.[4] In so finding, the court of appeals

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[3]Pertinent portions of Rule 11 are reproduced at Pet. App. 15a-16a.

[4]Copies of the transcripts of petitioners' February 20, 1980 arraignment and April 21, 1980 sentencing hearing are being lodged with the Clerk. Also being lodged with the Clerk is a copy of the Brief for the United States as Appellee (herein referred to as "Br.") filed in the court of appeals in this case, which contains detailed references to the transcripts demonstrating the district court's compliance with Rule 11(c)

specifically rejected petitioners' contention (Pet. 8-9) that the district court did not adequately explain the conspiracy charge in the indictment, a contention belied by the record.[5]

The court also rejected petitioners' assertion (Pet. 8) that they "contended from the very outset that they were not guilty even though they were pleading guilty" as a ground either for invalidating their pleas or for requiring the district court to allow them to withdraw their pleas.[6] The court of appeals' finding (Pet. App. 2a) that petitioners did not deny their factual guilt, only their moral guilt, is supported by the record (App. 80-81), and the court properly concluded (Pet.

(Br. 10-11), Rule 11(d) (Br. 15-16), and Rule 11(f) (Br. 20-21, 6-8). Transcript references in the court of appeals brief and in this Brief are to the appropriate page numbers in the Appendix ("App.") filed with the court of appeals.

[5]Appropriate references to the record are set forth at Br. 11-12, and establish that the district court made extensive efforts to ensure that petitioners understood the conspiracy charge. This case thus bears no relationship to the case cited by petitioners (Pet. 9), *United States* v. *Wetterlin*, 583 F. 2d 346 (7th Cir. 1978), cert. denied, 439 U.S. 1127 (1979), in which there was a total failure by the trial court to explain a complex conspiracy count.

[6]Petitioners maintain (Pet. 8) that they were not guilty, but pleaded guilty pursuant to an "all or nothing" plea bargain in order to spare co-defendant Robert Carr, Gloria Cain's father, who allegedly was in poor health, the necessity of traveling from California to South Carolina for trial, and that this constituted coercion rendering their pleas involuntary. However, petitioners did not voice any concern for Carr's health, or indicate that such a concern in any way affected their decisions to plead guilty, until allocution (App. 137-138, 149-151), two months after their guilty pleas were entered and accepted (App. 99-100), and after their motion to withdraw those pleas was denied (App. 123). In any event, it is not improper to include in a plea bargain conditions or promises as to the treatment of a co-defendant family member. See, *e.g.*, *United States* v. *Bartoli*, 572 F. 2d 188, 189 (8th Cir.), cert. denied, 438 U.S. 905 (1978) (promise to dismiss indictment against 62-year-old father in ill health); *Plunkett* v. *Commissioner*, 465 F. 2d 299, 306 (7th Cir. 1972) (promise to dismiss charges against wife in return for guilty plea in related criminal prosecution).

App. 2a) that petitioners' characterization of their acts as "merely a violation of a 'secular' law and not of their own moral law * * * is not a plea entitled to recognition in a secular *court where the defendants admit their violation of the secular* law."[7] In any event, a guilty plea may be accepted without an admission of guilt "[i]n view of the strong factual basis for the plea demonstrated by the [government] and [the defendant's] clearly expressed desire to enter it despite his professed belief in his innocence." *North Carolina* v. *Alford*, 400 U.S. 25, 38 (1970).[8] In the instant case, petitioners evinced their desire to plead guilty even though they did not consider themselves morally guilty (App. 80-81), and their pleas were amply supported by the government's evidence demonstrating their guilt.[9]

The record thus establishes that the district court fully complied with Rule 11, that petitioners' guilty pleas were

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[7]The italicized language appears in the court of appeals' decision as reported at 653 F. 2d 883, 884, but was omitted at Pet. App. 2a.

[8]As petitioners point out (Pet. 9), the district court was not satisfied with an equivocal plea (App. 81-82), despite *Alford*. Accordingly, petitioners ultimately entered unequivocal guilty pleas, stating that they were entering these pleas freely and voluntarily (App. 99-100). The district court's exhaustive inquiry on this subject (see note 4, *supra*) further supports this conclusion.

[9]See note 4, *supra*. Defense counsel himself conceded (App. 80-81, 135) that the nature of the evidence against petitioners was such that they would be convicted by a jury if they proceeded to trial, and that the government's case was sufficiently strong to support a guilty plea. Although, as petitioners point out (Pet. 8-9), the court's factual inquiry (App. 123-136A) was not made at their arraignment, but rather was postponed until the day of the sentencing hearing by agreement of the parties (App. 100), defense counsel expressly waived any objection to this postponement (*ibid.*), and the postponement was fully consistent with Rule 11(f). Rule 11(f) allows a district court to accept a guilty plea before conducting its factual inquiry, as the court did here (App. 99-100; Pet. App. 6a, 10a), as long as the court defers entering judgment on the plea until it has made its inquiry, as the court did here (App. 160-161).

entered voluntarily and intelligently, and that there was an ample factual basis for the pleas.

2. As the district court noted (Pet. App. 7a), it is well-settled that a defendant does not have an absolute right to withdraw a guilty plea, and that the decision whether such a withdrawal should be permitted rests within the sound discretion of the district court. See, *e.g., United States* v. *Strauss*, 563 F. 2d 127, 130-131 (4th Cir. 1977); *United States* v. *Simmons*, 497 F. 2d 177, 178 (5th Cir.), cert. denied, 419 U.S. 1048 (1974). While withdrawal should be permitted if the plea has been "unfairly obtained or given through ignorance, fear or inadvertence," *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927),[10] it is within the district court's discretion to deny a motion to withdraw a guilty plea where, as here, the pleas were given voluntarily and intelligently and were supported by the evidence, and the defendants advanced no compelling reason for permitting the withdrawal of their pleas.

Petitioners contend (Pet. 8) that they should have been allowed to withdraw their guilty pleas because they were not guilty, and because of an alleged recantation of grand jury testimony.[11] As to the first of these contentions, the district court correctly held (Pet. App. 11a-12a) that a conclusory allegation of innocence does not compel the court to allow withdrawal of a voluntary and intelligent guilty plea, see *e.g., United States* v. *Strauss, supra*, 563 F. 2d at 132; *United States* v. *Tabory*, 462 F. 2d 352, 354 (4th Cir. 1972);

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[10]Contrary to petitioners' suggestion (Pet. 7), Fed. R. Crim. P. 32(d) does not afford a defendant the absolute right to withdraw his guilty plea before sentence is imposed, but merely allows the defendant to move to withdraw his plea before sentence is imposed. The decision whether to grant the motion is entrusted to the discretion of the court. See *United States* v. *Simmons, supra*, 497 F. 2d at 178.

[11]Petitioners' remaining contentions go to the validity of their pleas when entered, and have already been discussed in that context.

United States v. *Barker*, 514 F. 2d 208, 221 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975). Otherwise "the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim" (514 F. 2d at 221). In any event, as discussed earlier,[12] petitioners denied only their "moral" guilt, not their factual guilt.

As to the second ground asserted for allowing withdrawal of the pleas, petitioners maintained at the hearing on their motion (App. 105) that one of the government's witnesses had recanted his grand jury testimony, and that in reassessing the case they believed that they had a meritorious defense to the charges against them. The district court correctly concluded (Pet. App. 9a-10a), however, that even if petitioners were able to prove this,[13] their reassessment of the case would not compel the court to allow the withdrawal of their pleas. See, *e.g.*, *United States* v. *Brown*, 617 F. 2d 54, 55 (4th Cir. 1980); *United States* v. *Pearson*, 483 F. 2d 809, 811 (9th Cir. 1973). As this Court stated in *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970):

> Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. * * * A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.

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[12]See pages 4-5, *supra*.

[13]Petitioners presented no evidence supporting their contention; and the government denied the allegation (App. 117). The government also indicated (*ibid.*) that the witness who allegedly recanted was only one of numerous government witnesses and his testimony was not critical to either count two or count ten of the indictment—the only counts involved here.

The district court reviewed the proceedings it had conducted pursuant to Rule 11 and determined (Pet. App. 8a) that petitioners' guilty pleas had not been "unfairly obtained" or "given through ignorance, fear or inadvertence." The district court also noted (Pet. App. 8a, 13a) that the government had relied on petitioners' pleas in accepting co-defendant Carr's guilty pleas to two counts of the indictment and allowing dismissal of the remaining eight counts against him,[14] in curtailing normal investigative procedures and trial preparation, and in making complete disclosure of its case available to petitioners in connection with preparation of the presentence report. The district court concluded (Pet. App. 14a) that petitioners had advanced no compelling reason for granting their motion to allow withdrawal of their pleas, whereas the government had demonstrated that it would be substantially prejudiced if the motion were granted. Weighing these considerations, as required by *United States* v. *Strauss, supra,* 563 F. 2d at 130-131, and *United States* v. *Tabory, supra,* 462 F. 2d at 354, the district court denied petitioners' motion. The court of appeals (Pet. App. 2a) properly determined that the district court did not abuse its discretion in denying the motion, and affirmed the judgment of the district court.

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[14]These counts were dismissed on April 7, 1980 (Pet. App. 13a; App. 113-115), nine days before petitioners filed their motion to withdraw their guilty pleas.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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